IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE ENRON SEC. LITIG.	§	
	§	
This document relates to:	§	
	§	
WASHINGTON STATE INVESTMENT BOARD and EMPLOYER-TEAMSTERS LOCAL NOS. 175 and 505 PENSION TRUST FUND, On Behalf of Themselves and All Others Similarly Situated	§	
	§	CIVIL ACTION NO. H-02-3401
Plaintiffs,	§	(Consolidated in Civil Action No. H-01-3624)
	§	CLASS ACTION
vs.	§	
	§	
KENNETH L. LAY, et al.,	§	
	§	
Defendants	§	

CERTAIN DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO THE MOTION TO STRIKE THE WASHINGTON STATE INVESTMENT BOARD CLASS ACTION COMPLAINT

TO THE HONORABLE JUDGE OF THIS COURT:

In their Joint Motion to Strike the Washington State Investment Board's Class Action Complaint ("Motion to Strike"), the Certain Defendants have explained that all of the claims in the Washington State Investment Board Class Action Complaint (the "*Washington Board* Class Action Complaint") should be stricken as an impermissible attempt to amend the *Newby* Consolidated Complaint. In response to Plaintiffs' Opposition to Certain Defendants' Motion to Strike, the Certain Defendants show that: (i) the Sarbanes-Oxley Act does not expand the statute of limitations for claims under §§ 11 and 15 of the 1933 Act; it is limited to claims asserted in fraud; and, (ii) the

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Washington Board Class Action Complaint is an impermissible attempt to circumvent the amendment requirements governing the *Newby* Class Action and to apply the Sarbanes-Oxley expanded statute of limitations retroactively to all claims asserted in that case. As demonstrated below, a plain reading of the statute reveals that the Sarbanes-Oxley Act does not expand the statute of limitations for *Washington Board*'s §§ 11 and 15 claims, and thus the two new claims should be stricken as time-barred. Further, *Washington Board*'s Class Action Complaint is essentially an improper attempt to amend the claims asserted by the *Newby* Plaintiffs so as to render the Sarbanes-Oxley Act retroactive, and should likewise be stricken.

In the related class action in *Newby*, the Certain Defendants were dismissed from Plaintiffs' § 10(b), § 20A, and § 20(a) claims. *See* Memorandum and Order, March 12, 2003 ("March 12, 2003 Order") (H-01-3624, Instrument #1269) at 149[1]; Memorandum and Order, March 25, 2003 ("March 25, 2003 Order") (H-01-3624, Instrument #1300) at 15.[2] The *Washington Board*'s nearly identical § 10(b), § 20A, and § 20(a) claims should similarly be dismissed, and should the Court deny the Motion to Strike, the Certain Defendants reserve the right to fully brief the statute of limitations issue and other grounds relating to the Plaintiffs' claims in a Motion to Dismiss, to be filed as

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[1] Dismissing these claims against Robert A. Belfer, Norman P. Blake, Jr., Ronnie C. Chan, John H. Duncan, Joe H. Foy, Wendy L. Gramm, Robert Jaedicke, Charles A. LeMaistre, Jerome Meyer, John Wakeham, Charls E. Walker, Herbert S. Winokur, and John A. Urquhart.

[2] Rebecca Mark-Jusbasche was dismissed from the Plaintiffs' Section 15 claims under the 1933 Act in addition to Plaintiffs' §10(b), §20A, and §20(a) claims.

contemplated by the Court's August 7, 2002 Order (H-01-3624, Instrument # 983).

ARGUMENT

A. The Sarbanes-Oxley's Extended Statute of Limitations Period for Fraud Actions Does Not Apply to *Washington Board*'s §§ 11 and 15 Claims.

Washington Board's attempt to insert two new §§ 11 and 15 claims based upon two additional Note offerings must be stricken as time-barred under the applicable statute of limitations. Plaintiffs in their Opposition to the Motion to Strike rely solely on the expanded statute of limitations provision of the Sarbanes-Oxley Act of 2002 as their basis for asserting their two new Note offering claims under §§ 11 and 15 of the 1933 Act. *See* Plaintiffs' Opposition to Motion to Strike (Instrument # 1297) ("Plaintiff's Opposition") at 1. This reliance is misguided. The Sarbanes-Oxley extension of the judicially-implied statute of limitations ***applies only*** to claims grounded in ***fraud***; does not supplant the existing limitations statute for §§ 11 and 15 claims; and does not apply to Plaintiffs' §§ 11 or 15 claims, which expressly ***exclude*** fraud.

1. Sarbanes-Oxley Did Not Supplant the Existing Statute of Limitations (§ 13) for §§ 11 and 15 Claims Under the 1933 Act.

The Sarbanes-Oxley Act amended the existing "catch-all" federal limitations statute found at 28 U.S.C. § 1658 for federal acts ***lacking*** an express statute of limitations. Section 804 of the Sarbanes-Oxley Act provides as follows (Sarbanes-Oxley added subsection (b)):

> (a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.
>
> (b) Notwithstanding subsection (a), a private right of action that ***involves a claim of fraud, deceit, manipulation or contrivance*** in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the

> Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of –
> (1) 2 years after the discovery of the facts constituting the violation; or
> (2) 5 years after such violation.

Sarbanes-Oxley Act, Pub. L. No. 107-204, §804, 116 Stat. 801 (2002) (emphasis added). Plaintiffs argue that this amendment increases the statute of limitations for their §§ 11 and 15 claims from a one year/three year period to a two year/five year period. *See* Plaintiffs' Opposition at 2. Plaintiffs admit that, absent application of this expanded statute of limitations, their claims regarding the 6.40% Notes and 6.95 % Notes would be time-barred. *Id.*

The touchstone for statutory construction is the text itself. *See Peter v. G.C. Sers.*, 310 F.3d 344, 351 (5th Cir. 2002) ("We may not look beyond the text of the statute except in those rare instances where using the plain meaning of the text creates 'absurd results.'"). Section 804 by its own terms applies "[e]xcept as ***otherwise*** provided by law" (emphasis added). By its own terms it has no application to causes of action arising under Acts of Congress as to which a limitations period is already "provided by law." Moreover, by its own terms Section 804 amends only 28 U.S.C. § 1658 and contains no amendment to an existing statutory limitations provision. *See* Section 804 ("(a) In General—Section 1658 of title 28, United States Code, is amended—. . ."). 28 U.S.C. § 1658 is the general statutory "fallback" limitations provision that applies only to federal claims that do not have a specific limitations period. *See* 136 CONG. REC. S17,581 (daily ed. Oct. 27, 1990) (statement of Sen. Grassley) ("[Section 1658] provides a fall-back statute of limitations . . . for federal civil actions by providing that, except as otherwise provided by law, a civil action arising under an Act of Congress may not be commenced later than 4 years after the cause of action accrues.").

By amending 28 U.S.C. § 1658 to include a specific statutory provision governing claims involving "fraud, deceit, manipulation, or contrivance" under the 1934 Securities Exchange Act, Congress intended to create a "fall-back" statute of limitations period for those Securities Exchange Act claims which do not already have a specific statute of limitations period of their own. *See North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 n.* (1995) (explaining that "28 U.S.C. § 1658 . . . supplies a general 4-year limitations period for any federal statute subsequently enacted ***without one of its own***." (emphasis added)). Section 804 applies to § 10 claims under the 1934 Securities Exchange Act, because those claims are judicially implied causes of action lacking a specific statute of limitations provision. *See Lampf, Pleva, Lipkind, Prupis, & Petigrow v. Gilbertson*, 501 U.S. 350, 358 (1991) (explaining that because § 10 claims are of judicial creation, they have no express statute of limitations period); *see also* March 12, 2003 Order at 36. Before the enactment of Section 804, Courts were required to look to other statutory provisions within the Securities Act and Securities Exchange Act in order to "borrow" the limitations period for § 10 claims. *Lampf*, 501 U.S. at 361-62.

In contrast to § 10 Exchange Act claims, § 11 Securities Act claims are ***governed by their own express statute of limitations period provision*** — § 13 (15 U.S.C. § 77m) of the 1933 Act. Consequently, the Sarbanes-Oxley amendment of 28 U.S.C. § 1658 by its own terms is inapplicable to § 11 claims. Section 13 provides that

> "[n]o action shall be maintained to enforce any liability created under Section 11 or Section 12(a)(2) unless brought within one year after the discovery of the untrue statement or the omission, ... In no event shall any such action be brought to enforce a liability created under Section 11, or Section 12(a)(1) more than three years after the security was bona fide offered to the public, or under Section 12(a)(2) more than three years after the sale."

15 U.S.C. § 77m (2003). Courts have consistently held that § 13 is the applicable limitations period

for § 11 claims. *See Lampf*, 501 U.S. at 360 & n.7 ("Congress also amended the limitations provision of the 1933 Act, adopting the 1-and-3-year structure for each cause of action contained therein."); *Summer v. Land & Leisure, Inc.*, 664 F.2d 965, 967-68 (5th Cir. 1981) (stating that § 11 claims are governed by the specific limitations period contained in § 13 of the 1933 Act). 28 U.S.C. § 1658 does ***not*** to apply to causes of action governed by their own express statute of limitations provisions.

It is significant that in amending 28 U.S.C. § 1658 to expand the limitations period for ***fraud*** actions from an [implied] one year/three year period to a two year/ five year model, Congress elected not to modify in any way the one year/three year limitations scheme of § 13 for Securities Act claims. Had Congress intended to expand the statute of limitations for § 11 claims as part of the wide-ranging statutory amendments contained in Sarbanes-Oxley, Congress certainly could have done so. It chose, however, to leave § 13 intact. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."). Consequently, Sarbanes-Oxley did not change the applicable one year/three year limitations scheme applicable to Plaintiffs' §§11 and 15 claims, and those claims, therefore, are time-barred and cannot be "revived" by Sarbanes-Oxley.

2. By its Own Terms, the Sarbanes-Oxley Limitations Expansion Applies Solely to Fraud Claims, Not Strict Liability Claims Under §§ 11 and 15.

Turning again to the clear and unambiguous language of Section 804, the statute expands the limitations period for securities cases involving "a claim of ***fraud, deceit, manipulation or contrivance*** in contravention of a regulatory requirement." *See* Section 804(b) (emphasis added).

The plain meaning of the statute demonstrates that Plaintiffs' §§ 11 and 15 claims fall outside the scope of this provision, as these claims require no showing of fraud, deceit, manipulation or contrivance, but instead are strict-liability claims based on statements or omissions in registration statements.[3] Notably, Plaintiffs in their Complaint expressly affirm that their §§ 11 and 15 claims do not sound in fraud. *See Washington Board*'s Class Action Complaint at ¶ 337. Plaintiffs

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[3] Section 11(a) provides the following:

> [A]ny person acquiring such a security [based on a misleading registration statement] (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction sue: (1) Every person who signed the registration statement . . ..

15 U.S.C. § 77(k) (2003).

No level of scienter is required under the statute. Compare § 11 to § 10 which provide as follows:

> It shall be unlawful for any person directly or indirectly . . . (b) to use or employ, in connection with the purchase or sale of any security . . . any ***manipulative or deceptive device*** or ***contrivance*** in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15. U.S.C. § 78j (2002) (emphasis added).

Section 10 utilizes the same language as that used to describe the claims that can be brought under the expanded statute of limitations under Sarbanes-Oxley. Rule 10b-5 likewise uses the identical language that Congress used to describe the claims under Section 804 of Sarbanes-Oxley:

> It shall be unlawful for any person, directly or indirectly . . . (a) to employ any ***device, scheme, or artifice to defraud***, (b) make any untrue statement of a material fact or omit to state a material fact . . ., or (c) to engage in any act, practice, or course of business which operates or would operate as a ***fraud or deceit*** upon any person in connection with the purchase or sale of a security.

17 C.F.R. § 240.10b-5 (1990) (emphasis added).

unequivocally explain that "[f]or the purposes of this claim, plaintiffs expressly ***exclude and disclaim any allegation that could be construed as alleging fraud or intentional or reckless misconduct***, as this claim is based solely on claims of strict liability and/or negligence under the 1933 Act." *Id.* (emphasis added). Plaintiffs may not simultaneously exclude and disclaim fraud in their pleading, and then, in their Opposition, argue that Section 804, which applies only to claims sounding in fraud, deceit, manipulation or contrivance, would apply to the same claims as to which they ***disclaimed*** fraud.

Looking beyond the plain language of Section 804 to the larger statutory scheme further confirms that the Sarbanes-Oxley expanded statute of limitations is intended to apply ***only*** to those claims sounding in fraud. *See Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998) (looking to the arrangement and placement of a certain statute within its larger statutory context). Section 804 is itself entitled "Statute of Limitations for Securities Fraud" and falls under Title VIII's topic of "Corporate and Criminal Fraud Accountability."[4] Significantly, the term "securities fraud" with respect to violations under Title VIII has been defined as applying to "[w]hoever ***knowingly*** executes, or attempts to execute, a scheme or artifice . . .."[5] This language clearly is intended to apply to claims of securities fraud requiring scienter, as opposed to claims based upon strict liability or negligence.

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[4] *See* Section 801.

[5] *See* Section 807 (emphasis added).

The remaining statutory provisions within Title VIII further highlight the scienter-based claims intended to be covered by Section 804. For example, Section 804 keeps company under Title VIII with provisions such as those dealing with "Criminal Penalties for Altering Documents,"[6] "Review of Federal Sentencing Guidelines for Obstruction of Justice and Extensive Criminal Fraud,"[7] and "Criminal Penalties for Defrauding Shareholders of Publicly Traded Companies"[8] to name a few. Thus, both the plain meaning and the statutory context of Section 804 underscore that Congress intended the expanded statute of limitations of Sarbanes-Oxley to apply *only* to securities claims sounding in fraud and requiring scienter, not claims based on strict liability or mere negligence.

Sarbanes-Oxley's expanded limitations period applies only to those claims sounding in fraud. It does not apply to *Washington Board*'s §§ 11 and 15 claims which should, therefore, be stricken as time-barred.

B. *Washington Board*'s Class Action Complaint Impermissibly Attempts to Amend the *Newby* Class Action.

Not only should the *Washington Board*'s §§ 11 and 15 claims be stricken as time-barred, but also, as discussed in the Certain Defendants' Motion to Strike, *Washington Board*'s Class Action Complaint violates the Court's Scheduling Orders and is an attempted unauthorized and

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[6] This provision applies to the destruction, alteration, or falsification of documents to the federal government or the destruction of corporate audit records. It applies to "[w]hoever ***knowingly*** alters, destroys, mutilates, conceals . . . ;" *see* Section 802(a)(1) (emphasis added), and to "[w]hoever ***knowingly*** or ***willfully*** violates (a)(1). *Id.* (emphasis added).

[7] Enhancing criminal sanctions for those who violate 28 U.S.C. § 994. *See* Section 805.

[8] Amending 28 U.S.C. § 1348 to enhance punishment for "[w]hoever ***knowingly*** executes, or attempts to execute, a scheme or artifice — (1) to ***defraud*** . . . ; (2) to obtain by means of ***false*** or ***fraudulent pretenses***, representations, or promises . . . ." *See* Section 807 (emphasis added).

impermissible amendment to the *Newby* Consolidated Complaint. *See* Motion to Strike at 1-7. Lead Plaintiff in the *Newby* Class Action, knowing that it cannot amend *Newby* to allege claims outside of the pre-Sarbanes-Oxley one year/three year statute of limitations period, brings a substantially identical action under the *Washington Board* Class Action Complaint. *Washington Board*'s Class Action Complaint is thus nothing more than a transparent attempt to circumvent the pleading rules and this Court's scheduling orders, and to attempt to secure by other means the retroactive effect of the Sarbanes-Oxley expanded statute of limitations period – contrary to Congressional intent.

1. Sarbanes-Oxley is Not Retroactive.

The Sarbanes-Oxley Act is not retroactive. Congress expressly provided that "[t]he limitations period . . . shall apply to all proceedings addressed by this section that are commenced ***on or after the date*** of the enactment of this Act [July 30, 2002]." Section 804(b) (emphasis added); *see also De La Fuente v. D.C.I. Telecomm., Inc.*, No. 01 CIV. 3365(CM), 2003 WL 832009, at *6 (S.D.N.Y. March 4, 2003) ("Congress' intent is clear the statute of limitations established by the Sarbanes-Oxley Act applies only to proceedings commenced after July 30, 2002."). In fact, this Court, in its March 12, 2003 Order, recognized that the expanded limitations period for § 10(b) claims under Sarbanes-Oxley "does not apply in *Newby*." *See* March 12, 2003 Order at 36 n.20. *Washington Board* argues that it is bringing claims that could not have been pleaded until the enactment of the Sarbanes-Oxley Act of 2002. *See* Plaintiffs' Opposition at 1. However, in reality, *Washington Board* and its lead counsel are attempting an end-run around the statute of limitations applicable to the *Newby* Complaint, by seeking to amend the *Newby* Complaint under the guise of a separate class action, and adding claims that would be time-barred in *Newby*.

The *Washington Board* Class Action Complaint was filed five months after the April 8, 2002

deadline to file a Consolidated Complaint in the *Newby* Consolidated Class Action lawsuit. *See* Motion to Strike at 2. As discussed in detail in the Certain Defendants' Motion to Strike, the claims alleged by *Washington Board* mirror the claims in *Newby*, and in most respects are virtually identical. *Id.* at 3. All of the 39 individuals and 16 entities sued in *Washington Board* under §§ 10(b), 20(a) and Rule 10-b5 are already sued by Lead Plaintiff in *Newby*. *Id.* Notably, *Washington Board* is the subclass representative of the Texas Securities Act Claims asserted in the *Newby* Consolidated Complaint, and is also a member of the class pursuing the §§ 11 and 15 claims. *Id.* at 4. Moreover, the Regents of the University of California—the Lead Plaintiff in the *Newby* Class Action—is listed as the Lead Appointed Plaintiff in the *Washington Board*'s Class Action Complaint, and the *Washington Board* Class Action Complaint was filed by the same firm which is Lead Counsel in *Newby*—Milberg, Weiss, Bershad, Hynes, & Lerach, L.L.P. *Id.* at 2.

As is apparent from a comparison of the *Newby* Consolidated Class Action Complaint and the *Washington Board*'s Class Action Complaint, *Washington Board* has exported and duplicated the class action in *Newby* in another lawsuit after the Court has already taken jurisdiction of the class claims in the *Newby* lawsuit. Plaintiffs' motives are clear—they would have been unable to obtain leave to amend the *Newby* Complaint to claim the more generous limitations provisions under the newly enacted Sarbanes-Oxley Act, so they undertake in the alternative a smoke and mirrors approach to expand the class action period for plaintiffs who have already sued in *Newby*.

2. *Washington Board* is Distinguishable from *Pulsifer*

Plaintiffs argue in their opposition that the instant case tracks the situation in *Pulsifer v. Lay*, and that the Court should reject the Certain Defendant's Motion to Strike the instant claims, just as the Court denied the Certain Defendants' "nearly identical motion to strike" in *Pulsifer*. *See*

Plaintiffs' Opposition at 5. Nothing could be further from reality. The instant case is wholly inapposite to the situation presented in *Pulsifer*. The § 11 claim in *Pulsifer* based on the 7% Note offering ***was originally brought in the Newby class action*** by a sole class representative who opted out of the *Newby* lawsuit. While the *Pulsifer* Complaint was filed four months after the deadline for filing the Consolidated Complaint, the Court, in denying Defendants' motion to strike the complaint, explained that "defendants have had sufficient notice and suffer no prejudice" as "the Pulsifer action is not the only one asserting the same § 11 claims that have been consolidated into *Newby*." *See* March 12 Order at 59. The *Pulsifer* claim was not, on its face, time-barred.

The instant case is the opposite of that in *Pulsifer*. *Washington Board*'s objective is to ***add*** claims that the Plaintiffs in *Newby* could ***not*** have brought because such claims would have been time-barred under the pre-Sarbanes-Oxley one year/three year statute of limitations period. *Washington Board* expressly admits in its Opposition to the Motion to Strike that these claims could not be asserted in *Newby* because they would have been time-barred.[9] *See* Plaintiffs' Opposition at 1. In compliance with Federal Rule of Civil Procedure 15 governing amendments to pleadings, to add these claims to the *Newby* Class Action would have required that the *Newby* Plaintiffs file a motion for leave to amend, with the predictable result that Defendants would respond and object to such an amendment as being expressly time-barred by Sarbanes-Oxley, and extremely prejudicial to Defendants.

[9] Clearly the events and actions between September 9, 1997 and October 18, 1998, the class period pled in *Washington Board*'s subsequent Complaint, would have been barred under the one year/three year limitations period applied in *Newby*.

Allowing *Washington Board* and its lead counsel to effectively circumvent the statute of limitations bar in the *Newby* class action by filing a nearly identical class action which contains the same plaintiffs would effectively open the door to encourage lead plaintiffs in class action cases to export the original class action to a separate second class action and append to it an additional time period barred in the original lawsuit. Reduced to its essence, such a result would defeat Congress's expressed intent that the Sarbanes-Oxley Act is not retroactive. Properly viewed, *Washington Board*'s class action is nothing more than a veiled attempt to expand *Newby's* 1934 Act class action period by an additional year by inappropriately invoking the Sarbanes-Oxley's expanded limitations period.

PRAYER FOR RELIEF

For the foregoing reasons, the Certain Defendants request that the Court enter an order striking the *Washington Board*'s §§ 11 and 15 claims as time-barred, and also that he Court strike *Washington Board*'s Class Action Complaint as an impermissible attempt to amend the *Newby* Class Action.

Respectfully Submitted,

GIBBS & BRUNS, L.L.P.

BY: Robin Gibbs (w/permission)

Robin Gibbs
T.B.A. No. 07853000
Federal ID No. 4790
Kathy D. Patrick
T.B.A. No. 15581400
Aundrea K. Frieden
T.B.A. No. 24034468
1100 Louisiana, Suite 5300

Houston, Texas 77002
(713) 650-8805 (telephone)
(713) 750-0903 (facsimile)

ATTORNEYS FOR DEFENDANTS:
Robert A. Belfer, Norman P. Blake, Jr., Ronnie C. Chan, John H. Duncan, Joe H. Foy, Wendy L. Gramm, Robert Jaedicke, Charles A. LeMaistre, Jerome Meyer, John Wakeham, Charls E. Walker and Herbert S. Winokur.

GRAVES, DOUGHERTY, HEARON & MOODY
A professional Corporation

BY: John M. McKetta (w/permission)
John J. McKetta, III.
State Bar No. 13711500
Federal I.D. No. 29895
Helen Currie Foster
State Bar No. 24008379
Federal I.D. No. 29894
Eric G. Behrens
State Bar No. 02070500
515 Congress Ave. Suite 2300
P.O. Box 98
Austin, Texas 78767
(512) 480-5600 (telephone)
(512) 478-1976 (facsimile)

ATTORNEYS FOR DEFENDANT:
Rebecca Mark-Jusbasche

GOLDEN & OWENS, L.L.P.

BY: Bruce Golden (w/permission)
H. Bruce Golden
State Bar No. 08081500
Federal I.D. No. 8314
Randall C. Owens
State Bar No. 15380700

Federal I.D. No. 10406
1221 McKinney St., Suite 3150
Houston, Texas 77010
(713) 223-2600 (telephone)
(713) 223-5002 (facsimile)

ATTORNEYS FOR DEFENDANT:
John A. Urquhart

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served on all counsel by posting the same to the website www.esl3624.com pursuant to the order entered by United States District Judge Melinda Harmon, Southern District of Texas, Houston Division, in Civil Action No. H-01-3624 (Consolidated Cases) (Instrument # 819), on this 7th day of April, 2003.

Sydney Ballesteros